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MEMORIAL

CONCERNING

HARVARD COLLEGE.

1851.

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MEMORIAL

CONCERNING THE

RECENT HISTORY

AND THE

CONSTITUTIONAL RIGHTS AND PRIVILEGES

OF

HARVARD COLLEGE;

PRESENTED BY THE PRESIDENT AND FELLOWS

TO THE LEGISLATURE,

JANUARY 17, 1851.

SMITHSONIAN INSTITUTION

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1851.

MEMORIAL.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

The President and Fellows of Harvard College, having been notified to appear before the Legislature on the second Wednesday in January, 1851, if they shall see fit, to show cause why a bill, proposing a new organization of the College, reported at the last session of the Legislature, should not be passed, would respectfully submit to the government of the Commonwealth a brief statement of such considerations, as seem to them most important in relation to this subject.

In a document of this nature, which should assume the form of a Memorial, it is impossible to enter into a full examination of all the grounds, upon which the claims of Harvard College to the favor and fostering care of the Legislature are to be maintained. Little more can be done, than to suggest to those, who take an interest in the cause of thorough and sound education, some of the facts and reasons, which prove the great and constantly increasing advantages that have been derived from the organization and management of the College; to show how promptly it has met the rising demand of the community for higher and higher attainments of the pupils, and for improvements in the methods of instruction, and how earnestly and successfully it has sought for larger means of usefulness, which are at this moment, in their immediate results, giving the richest promise of future progress; and, finally, to indicate very concisely the legal argument demonstrating that the organization of the College, fortunate as it has proved itself to have been, cannot be safely, lawfully, or constitutionally overthrown, or essentially changed.

The Report of the Committee, who drew up and recommended the bill, is clothed in terms so vague, general, and desultory, that it is not easy to bring its several points under any methodical arrangement; but the substance of the Report, by which the reasons for the bill are supposed to be sustained, may be divided into the three following topics.

1. That the College, in the language of the Committee, fails to answer the just expectations of the people of the State.

2. That the principal cause of this failure exists in the present organization of its government; and that a remedy is to be found in an alteration of its Charter, enlarging the number of members in the Corporation, and providing for their election by the Legislature.

3. That this alteration of the Charter is to be effected by a simple legislative act, without consulting the government of the College, and without its consent.

Upon these topics we proceed to speak in their order, showing that the allegations of the Committee are incorrect in certain particulars, as to matters of fact, unsound in principle, and hazarded apparently with little knowledge of the actual state of the University at the present time, and of its progress for the last forty years; and that their argument in support of an alteration of the Charter, by a legislative enactment alone, is at variance with established laws, and of a tendency dangerous to all chartered rights.

I. It is remarkable that so grave and sweeping a charge, as that of failing to answer public expectation, should be advanced without a shadow of proof, or even an attempt to show wherein the failure consists. It is easy to make assertions, but on so large a subject, involving so many interests and such a complication of details, is it just to make them without a patient and careful investigation of the facts? The loose remarks of the Committee on this important head afford neither proof nor explanation; and yet, upon this very point all the complaints in the Report, and the demand for a change in the organization of the institution, necessarily depend. If the College has been successful, no change is required. It has not been successful, say the Committee, and therefore its Charter must be altered. Here we have an opinion unsustained by proof, and an inference from such an opinion, and nothing more.

Since the Committee rest their strength upon this assertion, as the groundwork of the bill presented by them to the Legislature, we are bound to examine it somewhat in detail, and ascertain how far it is supported by well known facts in the recent history and present condition of the University.

Let us inquire, in the first place, what is the public opinion concerning Harvard College, compared with other similar institutions, in regard to its literary and scientific resources, the use that is made of them, and the quality, extent, and thoroughness of the education furnished to its students. Is it not true, that, in the judgment not only of its own graduates, but of the well trained scholars of other and rival institutions, it has always been regarded as not surpassed by any American college, for the amount and value of the instruction it gives? This reputation and position we are proud to believe are not yet lost, and they afford presumptive evidence, of the strongest kind, that, if there has been any failure to satisfy reasonable expectations, it has not been owing to the methods of instruction, or to the kind and extent of the education which may there be obtained.

This is said in no spirit of boasting, and with no desire to claim a superiority over other colleges, which has not a foundation in the circumstances attending the progress of Harvard College, and by which it is now surrounded, but merely to show, that the liberality and generous confidence, with which it has been fostered in this community, have not been bestowed in vain, nor without corresponding and appropriate results. Being the oldest College in the country by more than half a century, and having larger resources than any other, it ought to offer superior advantages to its students; and that it does so is only a proof of the discharge of an obligation, on the part of those to whom its government has been entrusted, which it would be discreditable not to have discharged. Nor is it presumptuous to say, that this duty has been steadily and faithfully performed, and that, while the College has ever been recognized as the leading institution of the kind in the country, it has sought and embraced every opportunity for improvement in the means and methods of instruction, introducing new studies as the progress of science and intelligence has required them, and striving at all times to elevate the standard of the

education it conferred, as well as to adapt it to the wants and demands of the community.

These statements are especially and strikingly verified in the history of the College during the last forty or fifty years, and it is not necessary to examine into the proofs of progress in remote periods. The question does not turn so much upon what the College has been, as upon what it now is, and what have been its achievements and tendencies in recent times. If a marked and decided progress can be shown to have taken place within forty years, if it can be shown that great advances have been made in intellectual culture, pecuniary resources, the increase of the library, scientific cabinets, apparatus, and commodious buildings, in the number of students and of instructors, and that these have been chiefly effected by the joint efforts of the Corporation and the able and faithful men, whom that Board, in concurrence with the Overseers, have placed in the College to manage its internal affairs and guide the studies of its pupils; in short, that the education given there is in all respects as good, to say the least, as can be obtained at any institution in America; if these can be shown, it is believed that the Legislature will be slow to yield assent to the assertions of the Committee, that "the College has failed to answer the just expectations of the people of the State;" and that "the organization is such that it must necessarily resist changes in opinion and modes of instruction."

The number of students in a college, for a long term of years, may perhaps be considered as in some degree a test of its prosperity or decline, and of the public favor which it enjoys. If we go back forty years, that is, from 1806 to 1810 inclusive, we shall find the average number of undergraduates annually for five years, as shown by the catalogues, to have been two hundred and eleven. During the last five years, the average number has been two hundred and eighty; and the present year there are two hundred and ninety-three. For the last few years there has been a steady increase. This aspect of the College certainly does not indicate a decline in public estimation, nor a failure to answer the expectations of the people. It may be said, that more students might be accommodated and instructed, but the same is true of every other college in the country. Not

one of them has ever yet turned away a student because its halls or lecture-rooms were full. On the contrary, a large portion of them are languishing for the want of students, and efficient public support. Yale College is the only one, which has a larger number than Harvard; and the increase in that institution is not to be ascribed to any novelty or changes in the modes of instruction. No college has adhered more steadily to the old methods.

The establishment of new colleges has also had an important effect on the increase of numbers in those of earlier date. Fifty years ago, there were twenty-five colleges in the United States, some of which then scarcely existed, except in name; there are now more than one hundred and twenty in full operation; a ratio of increase equal at least to that of the population. The field from which our students came, at the beginning of the century, embraced almost the whole South, and a large part of the middle and northern states. There was but one other college in Massachusetts, and that in its infancy; and in fact the only important rival of Harvard in New England was Yale College. Dartmouth and Bowdoin were comparatively recent; and Brown University had but few students. There are now fourteen colleges and universities in New England alone, three of which are in Massachusetts, and all of them containing able and learned instructors, and all sustained by the zeal, energy, and liberality of a large body of friends.

At the south, within the period named, Maryland, Virginia, North Carolina, South Carolina, and Georgia, have successfully striven to create or invigorate seminaries within their own borders, which superseded the necessity of sending young men to the north for a collegiate education. The middle states have also greatly enlarged the number of their colleges, there being now nine in New York and ten in Pennsylvania, and they have added to the extent and usefulness of those then in existence. The Great West, which has been peopled almost entirely since the beginning of the present century, has for the most part supplied its own wants in this respect, and has furnished very few students to our eastern colleges.

Another circumstance, of much weight, tending to retard the increase of numbers in Harvard College, has been the constant

raising of the requisitions for admission. The object has been to secure a higher and more solid education, by inducing young men to remain at the academies till their minds were more mature, and their habits of application and discipline were better established. This has doubtless been practised to a considerable extent in other colleges, although in some of them the standard is still lamentably low. Harvard has always taken the lead in this painful process, and has kept, in this respect, really in advance of the spirit of the age. Neither parents, nor teachers, have always been willing to accede to the demands of the College in this matter. It has been necessary to create a public opinion, which should sustain the College, and to bear with the temporary unpopularity, which vigorous efforts against the common current never fail to produce.

But those, who have been active in this measure, may well congratulate themselves on their success. Forty years ago it was no uncommon thing for boys of thirteen years of age to enter college. Very few have recently entered at Harvard under sixteen, and the average age for several years has been seventeen. Nor have the students of Harvard alone been the gainers by this process. The example has been followed by other institutions; the standard of attainment is everywhere becoming higher, and the public begins to understand and value its importance. The oldest institution has always been the pioneer in this path, and at the present time practically demands higher requisitions than any other for admission within its walls. This is as it should be, but, so far as mere numbers of students are concerned, it necessarily produces an unfavorable effect.

Again, the expenses of living at Cambridge are unavoidably greater, than at any other place in the United States where a college is established, except in one or two of the large cities. The price of nearly every article, whether of necessity, comfort, or convenience, is in fact the same as in the city with which it is so much connected, and of which Cambridge almost forms a part. The charge for instruction, and the incidental expenses, are not materially higher than at other colleges, but the cost of living, of the food, raiment, and fuel, which every student must have, is at least double that for which the same may be obtained at many other institutions. In the face of all these dis-

couraging circumstances, the young student, alarmed at the requisitions of Harvard, tempted by the feelings of sectional patriotism to remain in his own Commonwealth, and threatened with the expense of a residence in a city where everything is comparatively dear, is often deterred from following his own desire, and seeking the best education, and is induced to resort to a nearer and cheaper college, when he would really prefer a degree from Harvard.

These remarks are not founded on theory or conjecture. Applications are constantly made to the officers of the College, by young men in various parts of the country, who express a strong wish to become pupils, but who are finally discouraged by the prospect of the expense, and are obliged by their narrow means to resort to some other institution. And what renders this circumstance a double misfortune is, that these young men are commonly in the class of those, who are eager to obtain an education for its own sake, and who would become an honor to the College. Let any one fairly consider the whole case, and he will be surprised rather that so many students continue to come to the College, than that it fails to attract more.

Nor does this burden of expense bear upon the students only. The professors, with their families, the other instructors, and all persons employed in the internal operations of the College, must be supported, and the salaries and compensation must be made adequate to this support. The erection of new buildings, as the progress of the institution requires them, the constant repairs of old ones, the alterations for better accommodation, and the wages of labor, must all be provided for on the same scale of expense. The government of the College is certainly not answerable for its location. Our forefathers thought proper to plant it in Cambridge, then on the borders of a wilderness, now a city; it has grown up and flourished there; and by no stretch of wisdom or economy can its affairs be administered as if it stood in Williamstown or Amherst.

It is needless to inquire, whether its success could have been achieved and maintained, to the extent it has been, without extraordinary efforts in some quarter to procure the means, and apply them properly. It is clear that this could not have been done, except by the unwavering and judicious course pursued by those to whom the charge of the College has been confided

for the last forty or fifty years. They have carefully sought, in all quarters, for such additions to its pecuniary resources and intellectual strength, as should secure to its alumni the best education which the country could afford. To gain this important end has been the aim of unceasing effort on the part of its government.

Although the result will not be questioned by any one, who is acquainted with the history of the College, yet it may be useful to refer to some of the steps which have been taken to procure it, and to show by what impulses the College has been steadily moved onward, and for what reasons, as far as they can be ascertained, new resources have been frequently and liberally contributed.

In 1801 the entire body of instructors, connected with the University, consisted of six professors and four tutors. There was a professor in each of the following departments; Divinity, Mathematics and Natural Philosophy, Hebrew and other Oriental languages, Anatomy and Surgery, Theory and Practice of Medicine, and Chemistry. The three medical professors were employed on subjects belonging rather to professional than collegiate studies. They gave a short course of lectures only to undergraduates. The professors of divinity and Hebrew also devoted a portion of their time to theological students, who were resident graduates. It thus appears, that the instruction to undergraduates, in all the departments, was given by seven gentlemen; three professors and four tutors.

How does this compare with the provision made for these studies at the present day? There are now ten professors, (besides two temporary vacancies in divinity and Latin,) each at the head of a separate department; four tutors, and three instructors in modern languages; thus ensuring thoroughness of teaching in as many studies as can be usefully embraced in a course, which continues no longer than four years. Recitations from text-books are regularly heard with great care by each of these seventeen officers, as they doubtless will be by the others, when the vacancies are filled. Moreover, seventeen courses of lectures are given by different professors, during the year, to the advanced classes, embracing a great variety of topics in literature and science, and especially designed to exhibit more comprehensive and practical views of the subjects, which have

occupied the students' minds, than can be obtained from the text-books alone, and to connect the past with the present state of knowledge.

This brief contrast is enough to show, that the College has not stopped nor lingered by the way, that it has kept fully up with the progress of the times, and that it has multiplied the objects of study, and enlarged the means of instruction, to an extent etirely adequate to every purpose of utility, and to all reasonable demands of the public. In fact, the quality of the instruction has improved to a degree which can scarcely be explained to persons, who have not made it a particular subject of inquiry, but which is fully understood and appreciated by those, who compare the attainments of their sons with those made by themselves thirty, or forty, or more years ago.

The Committee express the opinion, that Harvard College does not offer the proper advantages for qualifying young men for the various pursuits of life; that some desire "specific learning for a specific purpose," and "would gladly resort to an institution of the higher class, for a limited period of time, if they could there obtain instruction which would make them better farmers, or mechanics, or engineers, or merchants;" and that the compensation of the teachers should depend, in some measure, on their success in drawing students to their departments. And they intimate, that the exclusion of these objects is among the radical defects of the system pursued at Cambridge. The Committee seem not to have been aware, that every one of them has received the express and careful attention of the government of the College, the Corporation, Overseers, and Faculty, and that every one has been subjected to a fair and thorough experiment.

As early as 1826, the Statutes provided that the College should be "open to persons, who are not candidates for a degree, and who desire to study in particular departments only." This provision was thought, at the time, to promise large and beneficial results, by enabling young men, who had not the means, the time, or the inclination for pursuing a full college course, to profit by such instructions in the various departments, as would fit them for their special vocations in life. The scheme was carried into effect, and continued in operation twenty years. Any student was allowed to select such branches as he might

choose, and to receive the same instruction in them that was communicated to the regular classes. The plan of the Committee in this respect was completely carried out. Every department of the College was open to young men, who designed to be farmers, merchants, mechanics, or to follow any other pursuit. Each student was to have a diploma, or certificate, when he left College, testifying to his attainments in the particular branches to which he had devoted himself.

After an experiment of twenty years, however, it was found that there was no such public demand, and that the College was providing for wants which did not exist. During that period, forty-eight students, only, of this description, applied for admission; an average of a little more than two a year; and these were mostly such as had failed in the first instance in their examination for entering the regular college course. A scheme so unfruitful in its results was at last abandoned, three years ago. If it should be still supposed that provision is necessary for specific and partial studies, it is now supplied by the Scientific School, the students of which, if they desire it, have also the additional advantage of attending without charge all the lectures given to undergraduates.

A plan somewhat similar in its aims, and applicable to all the undergraduates, was devised in 1838, and immediately put in operation. In consequence of suggestions from various quarters, the recommendation of the professors themselves, and the acts of the Corporation and Overseers, the students in all the classes, after the Freshman year, were allowed to select certain studies, and discontinue others. This was called the Voluntary System, and was designed expressly to furnish specific studies, as far as possible, to those who desired them. If a young man was preparing for any particular occupation in life, he had an opportunity of storing his mind with the precise kind of knowledge requisite for his success. Moreover, the compensation of the instructors was to depend, in part, on the number of students drawn to the department of each, exactly in accordance with the views of the Committee.

Such was the theory, and it was regarded as an auspicious change by the friends of progress and reform. It was soon discovered, however, that the project of compensating the instructors in proportion to the numbers of their pupils, especially in

an institution consisting of established classes, was fallacious and impracticable. Students, who volunteered into one department, necessarily deserted another, and this without any regard to the talents and accomplishments of the respective instructors, but merely from the caprice of choice, and the attractive character of certain studies compared with others. It is more than doubtful, also, whether this theory of compensation is correct in principle. It tends to foment rivalships and jealousies. It supposes the professor to act from mercenary motives, or, at all events, it appeals to those motives as the springs of action. He is driven to seek for numbers, and, to gain these, he must aim at popular effect rather than deep and thorough instruction. There are many ways by which men of ability and learning can make more money than by teaching in a college, and if they were not influenced by the less interested and higher motive of a genuine love of letters or science, it would be difficult to find competent men to undertake that important and responsible task. If you would have the services of such men, you must ensure to them a liberal support, and then, with a proper reliance on their sense of character, exact a faithful performance of their duty.

The voluntary system has been continued, with various modifications from time to time, although experience early indicated the necessity of dropping this particular part of it. The plan, though matured with much reflection and care, has not fully answered the expectations of its projectors. The object was to enable students, after a certain degree of progress, to devote their time and attention to such studies as would have a direct bearing on their future occupations in life, the very thing considered so desirable by the Committee. It has been proved in practice, however, that many young men in college have not yet decided what occupations they are to pursue, and that very few of those, who have made this decision, are competent judges of the particular kind of studies best suited to their wants in this respect. It has hence appeared, that the choice has not been so much influenced by any forecast of the future, as by a present predilection, founded on taste, an imaginary preference, or a careful calculation of the relative amount of diligence necessary for maintaining a respectable rank in the different departments. Not one in ten, probably, has asked himself whether he

was to be a lawyer or physician, a farmer or merchant. Great praise is due to the instructors for the zeal and perseverance with which they have endeavored, for several years, to execute this plan, which a large portion of them had much at heart, although it increased their labors. It is still applied, in the two upper classes, to Latin, Greek, Hebrew, the modern languages, and mathematics.

Notwithstanding the comparative failure of these attempts to introduce the changes and new methods approved by the Committee, the government of the College must nevertheless claim the merit of having made the experiment seasonably, in good faith, and with earnest efforts to secure success. But the fact is, a liberal education, or an education which shall prepare a man to discharge with respectability and intelligence the duties of any station in which he may be placed, cannot be made up of fragments, or a select portion of specific studies. The whole mind must be trained, by taxing and invigorating its various powers, implanting elementary principles, and establishing the habits of thought and attention. This can be done only by a long and continuous course of discipline, exercised in many different studies, each of which shall contribute its share to unfold and strengthen the faculties, and prepare them for strong and harmonious action. Such an education qualifies a young man to enter upon life with a knowledge of himself, a confidence in his own resources and in his ability to apply them effectively, and with a consciousness that he deserves success, even if adverse circumstances disappoint his hopes; and such an education, complete and thorough, may be acquired at Harvard College; and, if it is not acquired, we are constrained to say it is not the fault of its organization, government, or instructors.

Let us now glance at the progress of the College in multiplying and extending its means of instruction. Within the last forty years, the three largest and most expensive buildings have been erected; Holworthy Hall, University Hall, and Gore Hall; the library has accumulated from fifteen thousand to fifty-seven thousand volumes, not including the law library, of fourteen thousand; the philosophical apparatus has increased more than three-fold in extent and value, having been gradually, although but partially, adapted to the new discoveries and improvements in science; the Rumford Cabinet, consisting of a large number

and variety of models and machines for illustrating the application of the sciences to the useful arts, has been wholly procured; and the mineralogical cabinet, which, thirty-five years ago, was comprised in a single case of moderate dimensions, now numbers about thirty-six thousand specimens, arranged and classified, and so disposed as to be accessible to every student who is inclined to pursue that branch of study.

Again, the professional schools of Divinity, Law, and Science, which now constitute an integral part of the University, did not exist half a century ago; they are comparatively recent creations; and, in estimating the progress of the institution, its means of public usefulness, and the labors, vigilance, and zeal with which it has been managed, these are to be as much taken into the account as the academical department. The Medical School has also grown up from small beginnings to its present state of prosperity. A regular and systematic course of instruction is given in all these schools, and four spacious edifices have been erected for their accommodation; Divinity Hall, Dane Hall, Lawrence Scientific Hall, and the Medical College. The new chemical laboratory, in the Scientific Hall, is very extensive and complete, embracing all the recent improvements for experimental investigations.

The number of professors in the advanced schools is thirteen, the number in the academical department, when the vacancies are filled, is twelve, making twenty-five in the whole. Nineteen of these professors reside in Cambridge, and give constant instructions; the six medical professors give their lectures at the Medical College in Boston. The average number of all the students residing at Cambridge, and immediately connected with the university, for the five years preceding 1810, graduates and undergraduates, was two hundred and twenty; the average number during the last five years has been four hundred and forty-seven. At present, as may be seen by the catalogue, the number is four hundred and eighty-one. In addition to these, the average number of students attending the medical lectures for the last five years has been one hundred and thirty-six; making a total average of five hundred and eighty-three.

It thus appears that Harvard College is now an institution of more than three times the size that it was a half century ago,

containing nearly three times the number of students, and more than three times the number of instructors, and giving an appropriate education in the most important professions, as well as conducting the preparatory studies of the more youthful class of pupils in a manner entirely adapted to the wants and wishes of the public; and, moreover, to assist in attaining these ends, the libraries and cabinets have been increased in a like ratio, and seven commodious buildings, two of stone and five of brick, have been erected.

Nor ought another prominent and valuable adjunct to the University to be overlooked in this general outline. The Astronomical Observatory is of recent date, having originated in the enlightened zeal of a few scientific gentlemen coöperating with the ardent efforts of the Corporation, and having been established by generous contributions from the patrons of the enterprise, and the noble bequest of one hundred thousand dollars by a single individual. Besides the general purposes for which the Observatory was designed, the Director and his assistants give instructions in practical astronomy, with the use of the instruments, to such special students as wish to profit by these great advantages. Observatories, so useful in improving the art of navigation and unfolding the sublime mechanism of the Heavens, have generally been the work and peculiar care of the governments in European countries, and have added largely to their renown in the estimation of the world; and the Observatory of Harvard College, created by private contributions, will be regarded by every enlightened citizen, as an object of just and honorable pride to the State, as well as to the institution of which it makes a part.

We may now inquire in what way, by what resources and efforts, and by whose agency, these great, expensive, and lasting improvements have been accomplished in so short a period? They are to be ascribed mainly to the wise and energetic measures adopted and steadily pursued by the Corporation, as the acting and responsible board. The presidents of the institution, and the prominent men who have been successively associated with them, such men as Theophilus Parsons, John Davis, Christopher Gore, John Lowell, William Ellery Channing, William Prescott, Joseph Story, and Nathaniel Bowditch, have spared no exertions, individually and in concert, to procure

from every quarter, public and private, the necessary means, without which, even the first steps could not have been taken. Sometimes the Legislature was appealed to, and at all times individuals of liberal minds and a generous spirit were sought out, both alumni and others, who, from motives of general benevolence, or a particular attachment to the College, might be induced to contribute of their abundance, either by donation or bequest, to the relief of its acknowledged or anticipated wants.

These remarks may be particularly applied to the seventeen years of Dr. Kirkland's presidency, for a greater or less portion of which period, the eminent gentlemen above named were united with him in the Corporation. To the well known personal character and influence of the President himself may be traced a large proportion of the benefactions so freely made during his official connection with the College. His associates and successors have labored successfully in the same field. More than seven hundred thousand dollars in value have been given to the College since the year 1800, besides the proportional share of the grant made to the several colleges in the Commonwealth by the Legislature. A large part of this amount has been money, bestowed for important foundations, and a very considerable proportion has consisted of books, instruments, and collections of various kinds. In procuring this large benevolence, while much must be attributed to the generous impulses of the givers, much is also due to the disinterested zeal, the direct solicitations, and personal influence of the President and Fellows, which stimulated and confirmed those generous impulses, and guided them to the end so happily attained.

This is not mere conjecture, but a well established fact, founded on abundant testimony. Ninety-four thousand dollars were given by one of the gentlemen named above. It was by the efforts of President Kirkland and other members of the Corporation, that two subscriptions, one in 1817, the other in 1826, amounting together to about fifty thousand dollars, were collected from individuals in various parts of the Commonwealth for the benefit of the Theological School; and it was by their joint influence, that foundations for at least four of the five new professorships in the undergraduate department were provided during that period. To similar efforts of his successors, and their coadjutors in the Board, we owe a fund

of twelve thousand dollars for beneficiary students, of twenty-one thousand dollars for the Library, of twenty thousand for astronomical instruments, of one hundred thousand for the maintenance of the Observatory, of ten thousand for the erection of a President's house, a donation of fifty thousand dollars for practical instruction in the sciences, a bequest of fifty thousand for the aid of beneficiary students to take effect hereafter, and another bequest of more than three hundred thousand dollars, one-half of which at a future day is to redound to the use of the University.

While these contributions do honor to the memory and character of those by whom they were made, they are at the same time a tribute to the fidelity and trustworthiness of those who received them; and an acknowledgment of the value, the success, and fair prospects of the institution over which they presided. They are certainly a proof of an entire confidence, not only in the men to whom these munificent gifts were immediately entrusted, but in the organization and stability of the Board, to whose management the donors believed them to be forever consigned.

The result of the whole is before the public. The position of the College, inadequate as are its funds for carrying out its comprehensive purposes, speaks strongly for the labors of love conferred upon it from so many quarters, for the successful efforts of its immediate guardians and its able professors, for the favorable opinion entertained by so many intelligent patrons, and for the general approbation of its system of instruction, indicated as well by the growing number of its pupils, as by the course pursued at nearly every other college in the country, where the same kind of instruction is given, in the same way, and with similar views of its utility.

It is for the Legislature to decide, whether anything more or better could have been reasonably expected from Harvard College, during the last forty or fifty years, than it has actually accomplished. Could its education have been advanced beyond its present point, even if such advance were proved to be desirable; or could its number of pupils have been expected to be larger, without further pecuniary aid for that special purpose? Could a greater confidence have been shown in the character and merits of the College by a discerning and liberal public, or could a more successful fidelity in the preservation and man-

agement of its resources have been exercised by a body of men under any organization during so long a period? Will it not be conceded by every one, that a more prompt and efficient response to what was regarded by many as the voice of public sentiment could not have been made, than has repeatedly been done by introducing important changes in the modes of instruction, and valuable additions to the subjects taught? And is not the organization of the institution, after a trial of two centuries, entitled to the approval and respect of the people of Massachusetts for the results it has produced, and for the pledge it affords, by these results, of a constant improvement commensurate with the progress of the country?

It seems to have been taken for granted by the Committee, that, if the Legislature had the legal and constitutional power to change the organization of the College, or, in other words, to effect a radical alteration of the Charter, they would undoubtedly do so as a matter of expediency. The facts briefly enumerated above are confidently appealed to, as showing at least the great improbability, that any other mode of governing the College would have produced a greater amount of good to the community, or have been more entitled to the entire approbation of the Legislature, than the one which has been established and practised for so long a time. Change is not always improvement, and it is seldom apt to be such, when a system which has stood the test of experience, fulfilled all reasonable hopes, and secured from its agents a faithful discharge of duty, is unhinged and deranged by theoretical amendments.

The predecessors of the present board of President and Fellows have been well known to the public; their character and intellectual qualities have placed them high among the first men of Massachusetts. Better men could not have been found to administer any system, for the plain reason that there were no better; and if they have failed to answer the expectations of the people, it may safely be affirmed, that these expectations are not likely to be answered by novel devices or untried forms. We can perceive no such virtue in mere organization, as the Committee would seem to imagine. Every system, whatever its organization, must be entrusted to individuals, and be executed by them, according to the measure of their judgment and ability. The best feature in any system is that, which secures

a judicious selection from the best men for carrying it into effect. If the past history of the College proves that object to have been attained, for a long term of years, nothing higher can be reached, and the motive for change does not exist.

II. We now pass to the second general topic of the Committee's Report, the proposed alteration of the Charter, by enlarging the number of members in the Corporation, and providing for their election by the Legislature.

The present Board consists of seven members, including the President and Treasurer; and vacancies are filled by the Board itself, subject to the negative of the Overseers. Not satisfied with this number, the Committee recommend fifteen, without assigning any special reason for their choice; and they propose that one-third of this number shall be elected by the Legislature every two years, thus making the term of office for each member six years; except the President and Treasurer, who, in regard to the mode of their election and tenure of office, are left on the old basis.

Since there is no magic in numbers, it is not probable, that, if a new charter were now to be granted, any person would insist that seven individuals constitute the precise and only number to which so high a trust can safely be committed. We are contented with this number, because it has proved itself perfectly adequate to every purpose for which the Board was constituted; and we prefer to retain it, because change in a long and well established usage, when its practical results have been all that could be desired, is always of doubtful issue and hazardous, and because there are substantial reasons why the duties now incumbent on the Board can be better performed by a small number than a large one.

By far the most weighty and responsible trust reposed in the Corporation is that of the funds. The entire history of the College proves this trust to have been scrupulously and most satisfactorily fulfilled from its very foundation. The Committee of the State Convention in 1821, appointed to report on the constitutional rights and privileges of Harvard College, looked carefully into this matter. They say, "As to the care and management of the funds, it is believed to have been cautious and exact, in a very high degree. No delinquency, to the amount of a single shilling, is known to have existed in any member of

the Corporation, or any of their agents or servants, from the time of the first donation, in 1636, to the present moment." This language is strong and conclusive, and it may be applied with equal force to the period of thirty years since the report was made.

The exactness with which even small sums have been preserved, and appropriated to their precise objects, is remarkable. The whole amount of the donations for beneficiaries yields an income at present of nearly fifteen hundred dollars, which is annually divided among meritorious and indigent students. This amount is composed of thirty separate donations, made at different times; the first of them just two hundred years ago. Five of these donations remain at the same amount as when they were originally given; each of the other twenty-five has considerably increased. If the examination were extended to the larger grants, the results would be equally favorable. And it is a matter of just surprise, reflecting the highest credit on the Corporation, that, while for a hundred years in the colonial times and during the revolution, the currency was in a state of constant and extreme fluctuation, the integrity of the College funds should have been preserved with so much exactness. Is it likely that fifteen men would have done the business better? More entire success they could not have attained.

No maxim in human affairs is better established, than that men acting together in important trusts will feel their responsibility in proportion to the smallness of the number of those with whom it is to be shared. On this principle we may probably account, in great part, for the excellent management of the seven men, who have been responsible for the College funds. All these men have stood prominently before the public, and each has regarded his personal character and reputation as deeply involved in the direction of the affairs submitted to the counsel and guidance of the Board. Moreover, they have had no private ends to answer, no compensation for their services, and no opening prospect of future advancement or benefit arising from any plans they might devise, or any measures they might adopt. If this responsibility had been divided among double the number, no one can suppose that it would have been felt with equal weight by the individual members, or have excited them to the same degree of activity and caution.

In a practical view, also, the number proposed by the bill, selected from various and even remote parts of the State, as suggested by the Committee, would be attended with embarrassment and serious difficulty. The regular and necessary business of the University requires frequent meetings of the Corporation. There is a stated meeting once a month, and on an average a special meeting as often, and sometimes much oftener. Is it to be expected, that fifteen men, scattered over the Commonwealth, or a majority of them, will give their time, and neglect their private affairs, to come to Boston or Cambridge once a fortnight, at their own expense, to attend these meetings? Such a thing cannot be presumed. Meantime, the work must be done; the College cannot stop; neither its pecuniary interests nor its internal operations can be allowed to suffer derangement. The effect would be to entrust the essential business to a committee, consisting of members residing near at hand, who could give their attendance, and of a smaller number probably than that of the present corporation; and when a full board should be occasionally brought together, they would do little more than confirm the acts of their agents. Whether this would be an improvement on the ancient and existing system, the wise can judge.

A reason assigned in the Report for enlarging the Corporation is, that it "would bring to the government of the College a variety of taste, knowledge, and opinion, corresponding to the sentiments of the people of different sections of the Commonwealth." Now, let us ask what is wanted as a preliminary guide for the judicious and effective management of a literary institution. Is it not to ascertain, as far as it can be done by observation, inquiry, and reflection, what is the state of enlightened public opinion on this subject? Is a man, because he is an inhabitant of a distant county, under more favorable circumstances for ascertaining and understanding this point? Public opinion on such a subject is not the local sentiment of a particular district, but the general voice of mankind. What then is to be gained, in this respect, by collecting men together from various and remote parts of the Commonwealth? As to "a variety of taste, knowledge, and opinion," it can scarcely be appealed to as an element of harmony, or a promoter of wise counsels and united action. It is more likely to be fraught

with sectional prejudices, and to breed discord, delay, and confusion. A college system must be uniform, and it cannot be bent to suit the varying opinions and tastes, the social habits, and peculiar desires of all the people in the State, for the obvious reason that these are not the same in different places, nor steady anywhere.

We do not perceive any advantage, therefore, that can be derived from the proposed combination, which is not already possessed; but we can clearly discover many evils with which it must inevitably be attended.

It is made an objection to the present form of the Corporation, that the office is "for life;" and the Committee say, in the same strain of objection, that "perpetuity of office and opinion is contrary to the genius of our institutions." Let us see what has been the official life of the Fellows in the Corporation. What kind of perpetuity have they enjoyed? During the last half century the average term of service in the Board has been ten years and three months. A few have served longer; others for a considerably shorter period; some for one or two years only. The bill provides that the Fellows shall serve six years. Is the difference worth considering?

Again, it has been proved in practice, that new elements have been constantly brought into the Board, thereby introducing a variety of ideas and a renovated spirit of activity. On an average there has been a new member as often as once in two years, being a change of one-fifth of the Fellows. The bill provides for a change of one-third in two years. Is this difference worth considering?

Perpetuity of opinion is a phrase not easily to be defined or comprehended in the present age of intellectual progress and triumphs. It would require something more than the forms of a corporation to arrest the current of opinion, or resist its influence upon the mind. Whatever meaning the Committee may attach to this phrase, however, we have adduced abundant evidence above to show, that the Corporation of the College have adhered to no rigid system of opinions, but have yielded freely to the general sentiments of the community, sought light wherever it could be found, and applied it in every way practicable for the prosperity and continued improvement of the institution. It may safely be asserted, also, that mere organization at the

present day, in these United States, is not a contrivance by which opinions can either be perpetuated or controlled.

The objections to that part of the bill, which provides a remedy for the imaginary danger of the existing mode of filling up the vacancies in the Corporation, by transferring the elections to the Legislature, are too obvious to need an elaborate examination. The great object to be sought, in an election to an office, is to obtain the services of a man, who, by his ability and character, is the best qualified to discharge its duties. If this object is gained, the form of doing it is of little importance; and a small number of electors, who understand the nature of the office, and whose relations to it leave no room for personal bias, is much more likely to make a judicious choice, than a large number entirely unacquainted with the subject. This has been completely verified in the history of the Corporation. The Board has been constantly filled by competent men, discharging their duty faithfully, and commanding the favorable regards of the public. Is it probable that better men would have been chosen by a different form of election?

This matter was doubtless maturely considered when the Charter was made, and there were wise men in those days as well as in later times. A principle so vital as that of the tenure of office, and security for its continuance, could not have been overlooked. And it is remarkable, that, in the six new charters proposed between the years 1672 and 1700, in some of which the Corporation was enlarged, the tenure of office and mode of election were precisely the same as prescribed in the first Charter. This fact would seem to furnish conclusive evidence, that, whatever changes in other respects might have been thought advisable, this particular feature was deemed to be of radical importance. Nor have any facts been produced, from which even an inference could be drawn, that an election by the Legislature, or any other body of men distinct from the Corporation, was proposed.

Furthermore, if the bill were put in practice, it would invade the rights and annul the powers of the Overseers, unless it is intended that they shall confirm the appointments of the Legislature. By the Charter, no election is valid, till it has received the assent of that Board; and, by the rules of the Board, this assent can be given only at a stated meeting of its members, a

majority of whom are chosen annually by the people or their representatives. The Corporation has in effect only a nominating power in the election of its own members, as well as of all other officers. No elections can be made, no degrees can be conferred, without the concurrence of the two Boards. In the exercise of power, the Corporation of Harvard College is under much heavier restraints than is customary in other similar institutions. In Williams College, for instance, and we believe in nearly all the colleges in the country, there is but one board, consisting of members who hold perpetual succession, fill up their own vacancies, make all appointments, and transact the important business, without the control or advice of any other authority.

Since custom and large experience have almost universally sanctioned this mode of constituting college boards, it must follow, that, in the opinion of considerate and practical men, it rests on sound principles, and is, on the whole, the best that can be devised. If it is not free from defects, the same may be said of every other imaginable plan; and it has doubtless been believed, that these are greatly overbalanced by the superior advantages it affords, by the stability and permanence of action which it ensures, and by the steady confidence which it inspires. If the same advantages could be made to result from a different form of election, there might be no harm in the experiment; but even then no valid reason could be given for a change. It is not wise to hazard the loss of a good thing, with the doubtful hope of finding another equally good.

An election by the Legislature, at the short intervals of two years, certainly does not promise the security absolutely essential for the consistent action and permanent success of such a board. If one thing more than another is of vital importance to the prosperity of a literary institution, it is that it should be kept aloof in all its connexions from the agitating influences, which pervade the community from time to time, enlisting men's passions, and often biassing their opinions and perverting their judgment. Looking to experience, and to the nature of our political organization, can any one doubt, that the elections would turn on other points than those of the highest qualifications for the office? Would not each party, as it should have the ascendancy, take care to supply the vacancies from its own

ranks? These questions cannot but meet an affirmative answer in every mind.

What could be hoped from the wisdom or unanimity of a board, consisting of materials so dissimilar as would in this way be soon brought together? With good intentions as individuals, how long would a body of men thus organized, possessing conflicting ideas on many prominent topics, and acting upon different principles in many points of moment, be likely to command the confidence and respect of the public? Fluctuating counsels would lead to feeble measures, and contending opinions would foment discords, and generate instability. Would the sagacious men, who so largely contributed at different times to the aid of the College, have entrusted their munificent benefactions to the guardianship of a board thus constituted?

There is still another aspect, scarcely less unfavorable. Men, who have been elected on political considerations, will easily persuade themselves that they must support their friends; and we shall have professors and other officers chosen under the same influences, till the College itself will become an arena of party conflicts, instead of a quiet retreat for the discipline of youth in the learning and habits, which are designed to qualify them to discharge, in the years of manhood, the duties of good citizens and good men.

But we will not extend our remarks on this point. Its bearings are easily traced, and cannot fail to make a strong impression.

Having thus presented such a statement of facts, and such reasons, as in our opinion render it in the highest degree inexpedient to change the organization of the College government, especially in the manner proposed, it remains only to urge upon the attention of the Legislature, the considerations that arise from the legal and constitutional view of the subject.

III. In regard to the legality of the proposed measure, your Memorialists have given to the act and the Report accompanying it, and also that therein referred to, made by a Committee appointed for the like purpose at the preceding session, (Senate Doc. 158) careful consideration, and respectfully ask leave to submit the following considerations concerning it.

As the act contains no provision making the assent of the Corporation of any consideration, and no communication was made

concerning it to any member of the Corporation, and no opportunity given for any hearing upon the charges made, or the expediency of the change; and the speech, delivered by the Honorable Chairman in support of the bill, indicated that no regard was intended to be had to the assent or dissent of the Corporation, the Memorialists are called upon to consider the act as one intended to be imposed upon them, by virtue of the absolute power of the Legislature, irrespectively of any coöperation or consent on their part.

The act proposed, although entitled an act relating to Harvard College, and purporting to effect merely a change in the number of the corporators, and the manner of their election, is, in fact and legal effect, an act for abolishing the present Corporation by a seizure of its franchise, and a confiscation of its estates, for the purpose of a disposal of them to other persons, at the pleasure of the government. It is an act to enforce upon the Corporation a charter essentially and most materially differing from that, under which its estates have been acquired, held, and managed for two centuries; under which public and private donations, to an extent wholly unapproached in any other like institution in this country, have been made, with constantly increasing liberality and confidence, to the present day; and under which the College has maintained a uniform and unquestioned rank, in regard to its means and standard of education, certainly not surpassed by that of any other on this side of the Atlantic.

Your Memorialists, as the trustees and representatives of the College, have legal rights to this Charter; and under it have acquired and are the sole owners of the estates held by them for the purposes prescribed by it. The proposed act, if passed, will deprive them of both. It abolishes the Charter held by them, and substitutes another against their will. It seizes the estates from their possession and control, and places them in the hands of other persons, in whose appointment they have no voice. It transfers the right and power of governing the College from those who now hold it, in the manner prescribed by the Charter, to other persons. It takes the management and application of the funds placed in the hands of particular trustees, by the donors, with power to elect their successors, and to whom numerous benefactors have entrusted munificent gifts, in

the faith that such mode of appointment and succession would be perpetual, and commits them to the guardianship and control of persons, to be appointed by those, who may from time to time be members of the Legislature. It annihilates the most important function and duty of the Board of Overseers, by taking from them the power of rejecting persons elected to the Corporation. It is a virtual declaration of forfeiture of a franchise and of estates held under it, without trial or judgment. It is based upon the assertion of power which, if it may effect this change to day, may at any future time make the election of members and officers of the Corporation annual, or make any other change at pleasure. In short, the act is one for the destruction of the existing Corporation, and the organization of another in its place, upon wholly different principles and foundations.

Believing that the Charter of the College was granted and carefully framed for the chief, among other purposes, of giving to it, and the estates that should be granted, and the offices of membership and instruction that should be held under it, that permanency and security from agitations and dangers, by which alone its great and beneficent purposes can be accomplished; and that the generous donations, which constitute by far the greatest portion of its funds, were bestowed upon faith in the perpetuity of the Charter, and that none can hereafter be hoped for, if it be subject to any material alteration without the consent of the Corporation;—your Memorialists confidently trust, that changes so entire as that now proposed will not be made without the maturest deliberation, and a profound conviction of their legality as well as of their expediency; and, in availing themselves of the opportunity thus afforded, of presenting their views upon a subject of such grave importance, beg leave to express their appreciation of that sense of justice, which actuated the Honorable House in permitting them to be thus heard, before passing the decree of condemnation and forfeiture, which the passage of the act must import.

Whatever may otherwise be the demerits of your Memorialists, they entertain a becoming sense of their duties and responsibilities as trustees of a great institution, established for the public good, of high importance to the best interests of the Commonwealth, and which, hitherto, at least, has done much for the promotion of her welfare and glory; and of the respect and deference, which are due to the opinions and wishes of the

people, manifested by their delegates in the Legislature. Nor would they be disposed to oppose any reform thus desired, in the organization of the Corporation, consistent with their convictions that such was required by its interest, and their belief in their obligations to its benefactors, upon any grounds of merely legal right. Although the law deems the franchise of each member of this Corporation a thing of value, and a subject of property, yet there is no member of the Board who does not know that it is a severe burden, for bearing which there is no compensation except a sense of public duty performed, and from which it would be a sensible and great relief to be honorably discharged. But, as trustees of the College, holding its Charter and estates, and as its legal governors under the supervision of the Overseers—which Charter, estates, and government, have been placed in their keeping by virtue of that Charter, to be holden, administered, and transmitted, pursuant to its provisions, and most of which estates were bestowed in the faith that such tenure and administration were unalterable, unless by the consent of the trustees for the time being—your Memorialists would be false to themselves and their trust, should they acquiesce in any change in the Charter, which their own sense of duty and expediency do not sanction. Nor can they be considered wanting in humility, or due deference to the opinions of others, however elevated in rank and power, in thus making their own convictions essential to their assent; since the obligation of judgment and of action, according to their conscientious belief, upon that subject, is one of the first duties required of them by the nature of the trust, and from which they have no honest or honorable escape. With these feelings, and in discharge of this duty, they proceed respectfully to present their views upon the legal question now raised.

The alleged power of the Legislature to enact this bill is represented, in the Report of the Committee, to be derived from two sources; first, the rights of the State as founder of the College; secondly, the rights of the State recognized in the proviso to the first section of the fifth chapter of the Constitution. And the rights of the State as founder are stated to be of two kinds, namely, legislative authority to make all needful statutes for the government of the College; and visitatorial, or judicial authority, to examine the conduct of all persons entrusted with the management of the institution.

These propositions of the Committee, which are stated in their Report so generally as to make it difficult to comprehend their meaning and extent, are, however, more fully developed in the speech delivered by the Honorable Chairman in support of it, and to which reference therefore is necessary, as an exposition of the principles involved in them, and relied upon as authorizing the passage of the bill, and which are summed up in the following manner.

1. The State is the legal founder, having bestowed the first benefaction upon the College.

2. The institution is public, and therefore subject to the public will, which can be expressed only through the Legislature.

3. If the institution, legally considered, be private, the State, as the founder, being immortal, may regulate and govern it, as an individual may regulate and govern his own charity during his natural life.

4. That, in an eleemosynary institution, the law will notice no rights but those of the founder, and therefore, in this case, there is no interest adverse to the interests of the State.

5. That the corporators have no private legal interests in the offices which they hold; that they are the agents of the State for the distribution of its charity, and may be removed at the pleasure of the Legislature.

8. That the proviso in the Constitution of 1780 secures, in the Legislature, power over the Corporation and Board of Overseers of Harvard College, which may be exercised without the assent of any other body.

The sixth, seventh, and ninth are omitted, as immaterial in considering the question of legal right.

Your Memorialists believe, that no more forcible exposition of the principles, that would be involved in the enactment of this bill, could be suggested, than the bare recital of these propositions, upon which the authority of the Legislature to pass it is thus avowedly rested. They are, in express terms, or by necessary implication, that the College has no rights nor property, as against the State; that its officers hold all its estates merely as agents of the State, and subservient to its will; that those estates constitute a charitable fund belonging exclusively to the State, in which no other body or person has any right; and that the Legislature, as the sole expounder of the public will, may

abolish the Corporation, dismiss its officers, take possession of its funds, and dispose of them at its pleasure. It is true, that the report does not contain the direct declaration that the Legislature may convert those funds to purposes other than those of education; and that, in one part of the speech referred to, that power appears to be disclaimed. But it is self-evident that, if the propositions stated in it, as above cited, are maintainable, the State has the legal right to terminate such use of its own property at pleasure, and divert its charitable fund to any other use, which the Legislature may at any time think more conducive to the public good.

Both the Committees, who have had this subject under consideration, have rested upon the history of the College, and of the Colonial, Provincial, and State legislation concerning it, as indicating and illustrative of the powers now claimed to alter the Charter of the College, and control its affairs. But your Memorialists respectfully submit, that they have studied the history of the College, and of the Commonwealth and its past and present jurisprudence, in vain, if the principles upon which such power is asserted have any sanction or foundation in either of them.

The original design of the College is unquestionably found in the Act of the Colonial Legislature of 1636, by which it was resolved to give "£400 towards a school or college; £200 to be paid in the course of the ensuing year, and £200 when the work should be finished; and that the place and manner of building should be determined at the next court;" and, by the consequent order in 1637, that the College should be at Newton, and the appointment of twelve persons "to take order for a College at Newton;" which will stand forever, a monument alike to the piety, intelligence, and patriotism of the founders of the Commonwealth.

The poverty and financial condition of the colony were such, however, that no donation was made in pursuance of this resolve, until after the erection of the College, if it ever was paid; of which, to say the least, there is no proof whatever, unless the gift of the ferry, and the contributions of the colonial government in annual grants, subsequently made, were considered and received as in fulfilment of this promise.

But, in the ensuing year, John Harvard died, bequeathing to

the College his library, then of great value, and one-half of the residue of his estate, which was large for those times. And, with the means thus acquired, and private donations, including a receipt from the ferry, and two rates from Cambridge and Watertown, in 1639, the College edifice was erected; there being no reason to believe that the site for it had been selected until after this bequest; and the first money received and appropriated for its construction, and which approached to nearly one-half of the whole cost, was from the hands of the administrator of John Harvard's estate, from whom was also received the valuable collection of books and manuscripts which first graced its walls, and became the foundation of that library which still continues the most valuable and extensive in the Commonwealth.

Upon knowledge of this munificent bequest, by means of which the colonial government was enabled to commence and carry into effect its generous and patriotic design, they, in token of their gratitude, and in honor of his memory as its efficient founder, immediately ordered that the College should be named Harvard College. No declaration or act could be more expressive or conclusive of the opinion then entertained by the government, or of their design forever to establish the right of John Harvard to be considered the founder of the institution, than this baptism of it with his name. And no man, even upon the definition given by the Committee, had stronger grounds for claiming to be so esteemed. Nor until recent times has his claim ever been questioned. On the contrary, the colonial government, at a subsequent period, in a public address, in the year 1661, expressly designate John Harvard as the principal founder of the College. It might, under other circumstances, seem a needless criticism to add, that the term founder can have no other meaning than that of first or original donor or benefactor, and can with no propriety be applied to any subsequent one.

In 1640, the Legislature granted to the College the ferry between Boston and Charlestown.

In 1642, the first Board of Overseers was created, with powers to make orders and rules for the government of the College, and to manage and dispose of its lands and revenues, and of all gifts to the use of the College, or the members thereof. And, up to the year 1650, the property given to the College was vested in

the colony, and subject to its management and disposal, directly by the Legislature, or through the instrumentality of the Board of Overseers. No power, however, was given to that Board to receive or hold estates given to the College, but merely legislative and ministerial authority over it.

But in 1650 it was thought advisable, as a means, among other purposes, of encouraging donations, and of establishing the institution upon an independent foundation, obviously essential to its progress und usefulness, to make the College an incorporated institution; and the Charter was granted, by which, after reciting that, whereas, through the good hand of God, many well-devoted persons had been and were daily moved to give and bestow gifts, lands, legacies, and revenues, for the advancement of all good literature, arts, and sciences, in Harvard College, and to the maintenance of the President and Fellows, and accommodation of buildings, and other provisions that may conduce to the education of the English and Indian youth in knowledge and godliness, it was thereby enacted, that for those purposes the College from thenceforth should be a corporation, consisting of seven persons, to wit; a President, five Fellows, and a Treasurer, (who were therein named,) with power to appoint their successors, under approbation of the Overseers; and which President and Fellows, for the time being, should, forever thereafter, in name and fact, be one body politic and corporate in law; and should have perpetual succession; and should be called by the name of President and Fellows of Harvard College, and by that name should purchase and acquire, or take and receive upon free gift and donation, any lands, tenements, or hereditaments, (not exceeding a specified annual value,) and any goods and sums of money whatsoever, to the use and behoof of the President and Fellows and scholars of said College; with power to establish a common seal, to appoint officers, and make by-laws, if approved by the Overseers. And by an additional act, in 1657, the power to make by-laws was enlarged, so as not to make the previous consent of the Overseers essential to their validity, making them, however, subject to revision or rejection by that Board.

By virtue of this Charter, the College became a legal being, or person, endowed with powers to hold and manage estates, real and personal, appoint officers, and enact laws, for the accom-

plishment of the purposes of its creation, as prescribed in that instrument; with power of transmitting those powers and estates to other persons, of its own appointment, as members of the Corporation. And the legal title, possession, and absolute control of all the property, theretofore held by the colony for its use, and of all that should be subsequently acquired, became, or was to become, vested in the President and Fellows for the time being, as of the sole estate of the Corporation. They also became invested with all the rights, privileges, and immunities incident to membership of a corporate body, and subject to corresponding duties and obligations, for the fulfilment whereof they were amenable only to the Board of Overseers, and to the general laws of the land. And the State thereby surrendered all right and title to such property, and all power of resuming it, or of interference with those rights, privileges, and immunities, excepting in so far as any right of such interference was reserved in the Charter, or was inherent in the power to enact general laws regulating such corporations.

No change was made or attempted in the Charter, and nothing appears to have taken place indicating any question of its validity, or any interference with the rights granted under it, so far as your Memorialists can ascertain, until after the termination of the colonial government, in 1685, by which it had been granted, excepting the anomalous procedure in 1674, recited in the Report of 1849, by which the Overseers, Corporation, President, and students, were all summoned before the General Court and dismissed with a vote, "that if the College should be found in the same languishing condition at the next session, the President should be dismissed without a further hearing." As the College was then in a state of disorganization, four of the members of the Corporation having resigned their seats, leaving the Board without a constitutional quorum, and it was in utter confusion, and extreme poverty, depending upon the annual grants of the Legislature for daily subsistence, this strange exercise of arbitrary power, as obviously inconsistent with the personal as the corporate rights of the persons summoned, may well be accounted for, without supposing any reference on either side to the legal right of such a procedure; which it is believed that the most strenuous advocate for legislative supremacy would not venture to vindicate on legal principles.

The charter of 1672, also referred to in that Report, contained no material alterations of that of 1650, except by increasing the number of corporators to ten. It was, however, as is conceded, never accepted, or acted upon by the Corporation; and no effort was ever made by the Legislature to enforce it upon them. So far, therefore, as it is to be esteemed a precedent, it is one to the point, that an enactment affecting the charter, not accepted by the Corporation, was considered of no legal validity.

The Report of 1849 states, that, in 1673, "the General Court, by an order, made an addition to the Corporation." And this statement is seemingly much relied upon in that, and in the Report accompanying this bill. Your Memorialists have caused the records of the General Court and of the College to be searched, and are informed that no record of any such order, or of anything done under such an one, can be found in either. And they are satisfied that none such was ever passed. Upon inquiry for the authority, upon which this statement was made, they were referred to a note to the 159th page of first volume of Hutchinson's History of Massachusetts; the same work so emphatically denounced as containing false statements, and false law, in the learned speech before referred to. The note is obviously loose and general, not purporting to be of that specific nature which implies accurate information. It is merely, that, "Under this charter, (of 1650,) the College was governed until the year 1685, when the Colony Charter was vacated; saving that, in 1673, by an order of the General Court *some addition* was made to the number of the Corporation;" this author thus bearing testimony to the otherwise uninterrupted enjoyment of its charter.

It appears plain to your Memorialists, that the historian has, not unnaturally, confounded an order of the Overseers passed in December 1674, and a compliance with it by the Corporation, with a supposed order of the General Court so acquiesced in. It appears as before stated, that the College was in a state of entire disorganization by the resignation of four members of the Corporation, and by the disorders and dissatisfaction which followed. In this state of things the Overseers passed an order, commending to the President and Fellows *then remaining*, that they take care to fill up their number according to their charter, so that their power and privilege, granted by the General Court,

might not be weakened or abated in any kind; and the Corporation proceeded immediately to fill up the vacancies, in the usual regular manner. Indeed, these proceedings of the Overseers and Corporation are conclusive proof, that no such order of the General Court could have been passed, or, if passed, could have been acquiesced in by the Corporation, as otherwise they would have been needless.

Thus it is apparent, that no authority can be found in any action of the Colonial Government, by which the charter was granted, for the claim or right to revoke or alter it. That of the Provincial Government is the next to be considered.

In the great confusion of ideas concerning political and private rights and relations, which was caused by the cancelling of the Colonial Charter in 1684; and the general ignorance concerning corporate rights and privileges, the College being the only Corporation established in the Province, it was naturally to be expected, that great mistakes concerning them would exist, and corresponding irregularities take place in the administration of its affairs.

It appears, indeed, to have been inferred on all sides, that the vacation of the Colonial Charter repealed or abolished that of the College also. Probably upon the same principles on which it was assumed, that all Colonial acts, including even grants of lands, ceased to be valid. Under that impression the rulers of the Colony, both before and for a short period after the granting of the Provincial Charter, so far assumed the control of the institution as to appoint officers for its government. Such were the appointments of Increase Mather, John Leverett, Thomas Brattle, and William Hubbard, mentioned in the Report of 1849. But Mr. Mather, at the time of such appointment, was the acting President of the Corporation, under a previous request of the Overseers; Mr. Leverett was a member of the Board; and Mr. Brattle a tutor in the institution; so that the appointments may well be supposed to have been at the request and not in opposition to the desire of the Corporation. And it is worthy of observation, that these appointments are found only upon the books of the College,—no allusion whatever being made to them in the records of the Civil Government. They were not legislative acts, nor acts of that Government, otherwise they would have been so recorded; but were proceedings of those who were

acting as Overseers or officers of the College government, considering themselves as ex-officio and from the emergency of the case invested with such authority. And the appointment of William Hubbard as rector, which is stated in the Report as if it were a permanent one, was merely for the purpose of presiding upon one Commencement day, President Mather being absent in England; and moreover was made by Sir Edmund Andros, not remarkable for his respect of personal or political rights.

The dissolution of the Colonial Charter of course abolished the then existing Board of Overseers, created by the act of 1642, an essential portion of which had consisted of magistrates holding office only under it. But however misapprehended at the time, viewed in the clear light of more recent jurisprudence it did not vacate the College Charter of 1650; nor abolish the Board of President and Fellows who constituted the Corporation, and who continued to hold its franchise and estates, any more than such dissolution annulled any other grant made by the Colonial Government of lands, or other property, or privileges, liberties, and immunities of any sort to private individuals.

The anarchy of opinion and confusion into which the Colony was thrown by the repeal of its charter, were for a time rather increased than diminished by the Provincial Charter of 1691, which radically altered the political aspect of the Government, and destroyed the foundation upon which the clerical dominion had been established and ruled with almost absolute sway. That charter was sufficient, both by express terms and necessary implication, to renew and confirm the College Charter, if such renewal or confirmation had been necessary; but which necessity, for the reasons above stated, did not exist. As it was desirable, however, if possible to save the College from the dangers with which the new form of government was supposed to threaten it and all the religious institutions of the Province, the Corporation and friends of the College immediately exerted themselves to procure a new charter, which should permanently secure the College in their own exclusive possession and control, independently of all connection with, or interference of, the Government. This was the Charter of 1692, referred to in the Report of 1849, and which was rejected by the Crown.

The government of the College was forthwith organized under

this charter, and acted under it until its rejection in 1696. Upon that event being made known, Lieutenant Governor Stoughton assumed the responsibility of appointing the President, Fellows, and Treasurer, named in that charter, to proceed in the government of the College according to its late rules, until the further pleasure of his Majesty should be made known, or a legal settlement of the College should be obtained; all which is carefully entered upon the College records, and it is evident must have been with the concurrence and consent of those then representing the Corporation. Nor is any allusion to this proceeding found upon the records of the Provincial Government as would have appeared, had it been considered one under its authority, or in the course of its administration.

A further effort was made to obtain another charter, which resulted in the enactment of one by the General Court in 1697; and the members of the Corporation exerted themselves to have President Mather appointed to proceed to England to procure its ratification; in which, however, they did not succeed. This charter was also rejected. Several other efforts were made by the members of the College Government, and its friends, for the procurement of other charters in 1699, and 1700, all of which failed; and the General Court from that period, down to the year 1707, conferred the government upon the persons named in those charters, or upon others designated for that purpose; but always, as it is believed, unless the temporary appointment of Mr. Hubbard above mentioned be an exception, upon the particular friends of the College, and not in opposition to them.

It is manifest, however, that as all these proceedings were, in the understanding on both sides, that the charter of 1650 was vacated by the Province charter, and that the College, therefore, had no corporate existence, or rights; and were also by mutual concurrence of the government of the Province and of those acting as Governors of the College, no argument can be drawn from them in favor of the right of the Government thus to appoint, and act, or interfere with the affairs of the College, in contravention of the rights secured by that charter, if it was in truth still subsisting; nor can they be adduced as illustrative of any construction put upon it by the Government or Corporation; nor as evidence of the admission of any such right of government

or interference. They are entirely irrelevant in any discussion of the constitutional rights of the College under the charter, being based wholly upon its assumed dissolution.

This unfortunate and erroneous belief, of the supposed dissolution of the College Charter, was happily and finally terminated by an act in Council in December, 1707, concurred in by the House of Representatives, and approved by the Governor in the following words, "And inasmuch as the first foundation and establishment of that house, and the government thereof, hath its original from an Act of the General Court made and passed in the year one thousand six hundred and fifty, *which has not been repealed or nulled;* the President and Fellows of the said College are directed from time to time to regulate themselves according to the rules of the Constitution by the said Act prescribed, and to exercise the powers and authority thereby granted for the government of that house and the support thereof."

The College government was reorganized accordingly without delay. A Board of Overseers was assembled at the College according to the charter of 1650; the Corporation was reduced to its original number of seven, including Mr. Leverett, who had been previously appointed President; and his instalment in the office took place with appropriate ceremonies, and the records, charter, seal, and keys were delivered to him. The Corporation thenceforth continued in the uninterrupted and unquestioned enjoyment of their corporate privileges, estates, and powers under that charter, until the dissolution of the Provincial Government by the revolution, and the establishment of the original constitution of the Commonwealth in 1780.

The enactment of December, 1707, above recited, was not, as has been sometimes represented, a revival, a reinstatement, or restoration of the charter of 1650, for that had never been legally vacated or annulled. It was merely a declaratory Act of the Government of the Province, affirming its legal existence and validity, and pledging the public faith for its inviolability to those who should rely upon it in the making of contracts, or the bestowment of donations for the advancement of learning and religion, which the law holds to be in the nature of contracts.

But if the legal validity of the charter of 1650 could be considered as doubtful, or reasonably denied at the time of the passage of that act, your Memorialists respectfully, and with entire

confidence, submit, that such a declaratory enactment by the Government in confirmation of a preëxisting charter, or contract, passed for the purpose of restoring its action, and of inducing officers to resume the duties and trusts which it created and imposed, and benefactors of learning and religion to bestow gifts upon the College for their advancement in the manner provided by it, and upon the faith of its binding obligation upon the State, would have constituted a contract between the State and the Corporation, and those thus contracting with it, which would be equivalent to the regranting of such a charter, and which no subsequent Legislature could repeal, or alter, without the consent of the Corporation. That a private individual, who had thus recognized and confirmed a grant of estates, powers, or privileges previously made by him to trust us for specific purposes, and thereby induced others to convey to them valuable property in aid of their accomplishment, without reserving the power of revocation, would have been thereby forever legally barred from denying the validity of the original grant, and its perpetual obligation upon him, admits of no question; and unless the Provincial Government, and that succeeding it, are to be considered above the laws regulating the obligation of contracts, it is not perceived how the binding force of this act upon them can be reasonably questioned.

The next events in the history of the College were the revolution, which abolished the Provincial Government, and resulted in the establishment of the State Government, under a written constitution, in 1780; and the insertion therein of the Articles relating to the College to be presently considered; during which period of time no change was made or attempted in the College charter. As, however, the Board of Overseers, which had consisted in part of magistrates holding office under the Provincial Government, was abolished by its destruction, it became necessary for the newly created government to substitute another, in the same manner as the Provincial Government had done upon succeeding to the Colonial. But this procedure required no alteration of the charter under which the Corporation was established; being merely an arrangement for the exercise of that portion of the visitatorial power, which had never been vested in the Corporation; nor can it be considered a precedent for the exercise of such authority when such emergency did not exist.

Your Memorialists do not understand that any pretence is made, in any quarter, that the revolution and dissolution of the Provincial Government, and substitution of the State Government, vacated or in any wise affected the charter of the College, or any legal rights originally created by it.

In 1810 the Legislature changed the constitution of the Board of Overseers by an act, which made the acceptance of it by them and by the members of the Corporation essential to its validity, and which acceptance they gave.

In 1812 the Legislature passed an Act purporting to repeal the last named Act, and to restore the former constitution of the Board of Overseers. Against the passage of this act, the Overseers and Corporation remonstrated, as being in contravention of the chartered rights of the College; and reserved the right to test its validity by appeal to the judicial tribunals.

In 1814, and before any measures taken to try the question, the Legislature repealed the act of 1812, and reorganized the Board of Overseers, by an act requiring their assent and that of the Corporation, which were given, and which, with an amendment made by an additional act passed in the year 1834, to go into operation when accepted by the Overseers and President and Fellows of the College, and which was accepted by them, now forms the Constitution of that Board.

In 1820, when the Constitution of the Commonwealth was submitted to the people for amendment, a proposition was made for a change in the Board of Overseers, but was rejected. But none was suggested of any change in the charter of the College. And from that time, until the proposal of the Act under consideration, the College has been in the uninterrupted exercise of its powers and privileges, and in the discharge of the duties prescribed by the charter, without any effort to vary its terms or provisions.

Upon a revision, therefore, of the history of the College, and of the Legislative Acts concerning it, we have seen, that, during the existence of the Colonial Government, from the date of the charter in 1650 to the year 1685, a period of thirty-five years, and one in which, from the nature and necessities of the times, the exercise of arbitrary and unconstitutional power was not infrequent, no one act was done by the Legislature in contravention of the Charter, or for altering its provisions, against the

consent of the Corporation; and nothing in derogation of their rights under it, unless the singular proceeding above recited be so considered, which, as before suggested, it is impossible to look upon as a precedent of the exercise of lawful authority.

That, from the year 1685, when the Colonial Charter was annulled, to the year 1707, being fifteen years after the Provincial Charter was granted, a period of about twenty-two years, it was believed or assumed on all sides, that the College charter was abolished so that the Corporation no longer existed; and that, under that belief, the Government assumed authority and control over the College, not as exercising control over the Corporation created by the charter of 1650, but in a manner inconsistent with the idea of any existing corporate body, or corporate rights, for the purpose of preserving its estates and continuing its usefulness, but that all such acts appear to have been done by the concurrence of those, who were officers under the original charter, and of those subsequently appointed, who were the active friends of the institution, and anxious for its preservation; and not in derogation of any rights asserted by them in its behalf.

That, from the year 1707, and as soon as it was determined that the charter of 1650 was still in existence, until the termination of the Provincial Government in 1775, a period of about sixty-eight years, and one of kingly prerogative, not one change was attempted, nor one act done, in derogation of this charter.

That, in 1780, the chartered rights of the College, and it had none but under this charter, were recognized and confirmed in the fullest manner in the Constitution of the Commonwealth, by articles which still constitute a prominent portion of it; and that, from the revolution in 1775, to the present time, a period of seventy-six years, but one effort has been made by the Legislature, supposed to affect the legal rights of the Corporation under this charter, and this was soon after redressed by legislative enactment recognizing the necessity of its assent to any lawful change of that instrument.

So that, during the whole period of two hundred years, which have now elapsed since this charter was granted, there has been but one solitary legislative Act, which in any point of view can be considered in derogation of the rights of the Corporation under it, and that Act continued for the space of only two years.

And it may well be supposed, that those, who were instrumental in its passage, may have acted under the belief that an act affecting the constitution of the Board of Overseers only, and changing nothing but the mere exercise of a portion of the visitatorial power, could not be considered as infringing in any degree upon the rights of the Corporation, which were created and existed by a wholly distinct and independent charter. And with this, not unreasonable solution of that procedure, the College Charter stands for two hundred years, without any effort on the part of the Colonial, Provincial, Revolutionary, or State Governments to vary its terms, or derogate from the rights granted under it in any one instance.

Upon the history, therefore, of the College and of the Legislative proceedings concerning it, if that is to be considered as proof, or illustrative of the powers of the government over it, further comment is needless.

In regard to the legal positions taken by the Committee, as exhibited in their Report, and the speech in support of it, delivered by the Honorable Chairman, those resting upon the alleged rights of the State, as the founder of the College, have been stated; and the recital of them might be thought their sufficient refutation, to those conversant with the jurisprudence upon this subject. But their highly respectable authorship, and the confidence with which they were urged, seem to demand a more particular consideration.

That the State was the founder of the College in the strict legal sense of the term, as having endowed it with legal existence, is undoubtedly true; and in the same sense it is the founder of every incorporated institution within its boundaries. Nor can your Memorialists be supposed desirous to derogate in the slightest degree from her honor, whose reputation is as dear to them as it can be to any of her sons, in questioning the claim made by the Committee to consider her as the founder, in the sense in which they assert that she was, namely, as being the first benefactor or first giver of its revenues. It is true, that some eminent men and jurists have so considered and described her, in allusions to the history of the origin of the College, obviously in reference to the order of 1636, by which the Colonial Government agreed to give four hundred pounds for its establishment; and not probably knowing, that this agreement was

never specifically fulfilled; or, if so, not until after the donation of Mr. Harvard had been made, and expended as the first means of establishing and erecting the edifice of the College. It is obvious that the mere entry of such an order upon the records of the Colony formed no contract with any one, for no other party was in existence with whom such a contract could be made. It was merely a legislative resolve of what was expedient to be done for the public good; and which, while it proves the liberal and enlightened policy of its authors, might have been at any time with perfect right and justice revoked by them, without cause of complaint to any one. At the time of the bequest of John Harvard it was nothing more than an unexecuted resolve, of great, and perhaps of vital importance to the establishment of the College, as an assurance of public favor and support, and thereby inducing private individuals to endow it; but still not an actual gift, by which the College acquired any absolute estate, or fund, or means of subsistence. And history shows, that the first gift of this character, actually made, and which was sufficient to secure its immediate establishment, was that of John Harvard.

Under these circumstances, and under the sanction of the contemporaneous legislation of those who passed that resolve, and who so emphatically declared their understanding that he should be considered the founder by immediately bestowing upon the institution his name, and who, eleven years afterwards in a public memorial, declared him to be the principal founder, your Memorialists respectfully submit, that he is to be considered the founder, or first giver of its revenues; and that, in so far as this consideration may be of any moment, the founder was a private individual, and not the State.

But although the Memorialists deem it proper thus to set forth the claims of this good man and chief benefactor in the cause of learning, at the first establishment of the Commonwealth, to be considered the founder of the College, in justice to his good name and the cause of truth, yet in their judgment it is of no moment in the consideration of the legal question before the Honorable House, inasmuch as if it were conceded, that the State was the founder, in the manner supposed by the Committee, that circumstance would not import any power in the Legislature to enact this bill.

The inferences deduced from this supposed relation of the State to the College, that the State as such founder has legislative power to make all needful statutes for the government of the College, visitatorial and judicial power over its officers and administration, and power to prescribe the statutes of its foundation, and from time to time to alter the same, provided it does not impair the vested rights of any person, are, as your Memorialists humbly conceive, errors occasioned by confounding the original right of a founder of a charity to prescribe the terms and tenure of the grant establishing it, with those which may remain in him after its execution, and an acceptance of it by the grantees.

The general proposition of law, upon which these claims are understood to rest, is, that the State has the right to enact this bill, as founder of the College, possessing all power necessary for that purpose by virtue of that relation alone.

There is no doubt that the founder of a charity has the right in its creation to prescribe the terms and tenure upon which it shall be held, and the statutes by which it shall be governed, and to reserve the power of altering them from time to time; as also general legislative and judicial authority over the trustees, with power of removal and substitution, provided that such terms, tenure, and reservations be not repugnant to the general law. Nor can it be doubted that, if the grant be general in its terms, for the purposes of the charity, without prescribing any terms upon which it shall be held and managed, such general legislative and judicial power will remain in the founder, to be exercised at his pleasure; nor that, if the whole tenure and government are not granted to the trustees or other persons, the portion not thus parted with will remain in him. And any power thus expressly or tacitly reserved in the founder is called visitatorial, and may remain in him, or be at any time granted to other persons; and it constitutes a valuable estate, or property, recognized as such in Courts of Law and Equity.

But it is no less clear, that if, by the terms or nature of the grant, the founder has prescribed the tenure upon which the trust shall be holden, and the rights, powers, and duties of the trustees in the administration and perpetuation of it, and of those for whose benefit it shall be maintained, and has committed its entire management and government to the trustees solely,

or in connection with other persons, without reservation of any right to vary such tenure, terms, rights, powers, duties, government, or beneficial interest; and the grantees have accepted the grant, and entered upon the administration of the trusts; the founder has thenceforth no legal power, or right whatsoever, to revoke or alter the grant, or any power, duty, trust, interest, liberty, or estate created under it, or to interfere or intermeddle therewith, any more than would have any entire stranger to it; and that, where the whole right of government and perpetuation is vested in the trustees alone, no visitatorial power whatsoever remains in the founder; and none exists anywhere, excepting that which is common to the State over all eleemosynary institutions, under the general laws relating to them, to examine by its judicial tribunals whether the true objects of the charity have been kept in view and faithfully pursued, and its funds rightly administered.

In such case the grant is an executed contract between the founder and the grantees, and those for whose benefit it is made, which he can neither rescind, nor vary, nor impugn, without the consent of all.

These are now established elementary principles of law upon this subject, admitting of no reasonable question; and they cannot be subverted or violated without hazarding the destruction of all the charitable institutions within the Commonwealth, and forever shutting off those streams of benevolence and enlightened liberality by which the wants of learning and science, and of suffering humanity, are now chiefly supplied.

In order, therefore, to ascertain whether the State (admitting it, for the purpose of this inquiry, to be the founder,) possesses the power to pass this Bill, resort must be had to the grant contained in the charter, to determine whether it was thereby reserved, or remained in the State, because not expressly parted with.

Its provisions have been recited above, and by them it appears that the State did part with all the power, which it might otherwise have retained as founder, of making the change in the organization and government of the Corporation now proposed. The charter was an express grant to seven persons therein named, as President, Fellows, and Treasurer of the Corporation, of all the privileges, liberties and immunities of the Corporation in per-

petual succession, and gave to them the sole power of appointing their successors forever, subject only to confirmation or rejection by the Overseers. It granted to them and their successors so appointed the right to acquire and hold all the real and personal estates of the Corporation, to the use of themselves and the scholars of the College. It gave to them the sole power of appointing all the officers and servants of the College, and vested in them the exclusive right of enacting rules and laws for its government, and of administering them, subject only to the approval or disapproval of such appointments, rules, and laws, by the Overseers. In short, the State, by this charter, entirely divested itself of all power thenceforth over the College, visitatorial, or of any other description, and granted it wholly to the Corporation and Overseers, *unless* the Overseers are to be esteemed the mere agents or representatives of the State, in the exercise of that portion of visitatorial power reserved to them, subject to such alterations of the Board as the Legislature may see fit to make; in which case such portion might be considered as reserved to the State; but it falls far short of any power to authorize the enactment of the proposed Bill; and can by no possibility extend further than the modification of the agency, which is to exercise this power of confirmation.

But the legal nature and effect of such a charter do not rest upon these elementary principles of law, however generally recognized, but are established by the highest judicial authority known in this country, which has decided that such a charter constitutes a contract between the State and the Corporation created by it, and those entitled to beneficial interests under it, and those who shall have bestowed their bounty under it, and those in possession of its franchise and estates, sacred and inviolable; and which the State has no legal power to revoke, alter, or impair, without their consent, and the consent of all, of whom the holders of the franchise are the lawful representatives.

Another view, however, has been taken upon this subject, which your Memorialists are compelled to submit for consideration, for the reason that, although not alluded to in the Report of the Committee, it forms a prominent topic in the speech delivered by the Honorable Chairman in support of it, and must therefore be considered one of the positions relied upon in

recommending the passage of the Bill, and upon which the power to enact it is supposed to rest.

It is said that Harvard College is a public Corporation belonging to the State, that the corporators are merely servants or agents of the State, and that there is no contract under the charter, because the State is the only party having any interest, and no one has authority to appear to contest her rights. It is true that, in asserting the unlimited power which would seem necessarily to follow from such premises, the proviso was added, that its exercise could not extend to the confiscation or misapplication of the funds of the College. But such proviso is plainly inconsistent with what must be the inevitable legal conclusion from the positions taken, if they are sound, and is therefore a virtual surrender of them, if it means anything.

The whole basis of this position is stated to be the circumstance that the State was the founder of the College. It was expressly conceded that, if John Harvard was the first benefactor, or founder, the College would be a private Corporation, and the Legislature would have no constitutional power to pass this Bill. But it is alleged that, as the State was the founder by the gift of the public money, this is a public charity, and the College is a public Corporation, and therefore entirely at the control and disposal of the Government.

Your Memorialists are unable to find any authority for such conclusions, in any principles of law or judicial precedent with which they are conversant; but are constrained to consider them alike inconsistent with both.

In one sense, indeed, all Corporations established for charitable purposes, to the benefits of which the public are entitled, upon or without prescribed terms, are denominated public, as are many others in which the public are interested; but all of which, legally considered, are strictly private.

In correct legal description, those only are public corporations which are founded by the Government for political or public purposes, where the whole interests and franchises are of the exclusive property and domain of the Government itself, as incorporated cities, counties, and the like. But all eleemosynary corporations, such as Colleges, Hospitals, and similar institutions, holding property in their own right, with power to dispose of it

for the purposes prescribed by their charters, under the control and management of their officers, are private Corporations, from whatever sources they may have derived their funds.

Public corporations, properly speaking, are for the purposes of civil government or political arrangement, and are of course under the control and subject to the will of the government thus creating them for its own purposes. But eleemosynary corporations, for the purposes of education, or relief of individual suffering, by the administration of funds belonging exclusively to themselves, in the manner pointed out by their charters, are private. The tenure of their property, and the right of administering it, are, in the strictest sense of the law, private. The members of such corporations have private rights and privileges. They have the sole right of possession of the corporate funds. They have the exclusive right of administering them, and the power of governing, ordaining rules, and appointing officers and servants, if it has not been reserved or given elsewhere. These are all clear, distinctly recognized private legal rights, in the enjoyment of which the corporations and their individual members have a right to the protection of the law, and from any violation of which the law furnishes specific remedies. In the language of an eminent jurist, "the privilege of being a member of a corporation under a lawful grant, and of exercising the rights and powers of such membership, is such a privilege, liberty, and franchise, as has been the subject of legal interest from the time of Magna Charta to the present moment." Every member of such corporation has a franchise; it is his private right; and he may have an action at law against any one who may disturb him in the enjoyment of it.

The very purpose of a charter establishing an eleemosynary corporation, and bestowing property upon it, is to make and keep it private property, with all the security and inviolability incident to such tenure. The obvious purpose of this charter was to divest the Colony of the funds, which it then held for the benefit of the College, and to establish a legal private ownership in the Corporation, who, by exercise of the powers granted, might hold and protect it, and all that should thereafter be given to them, for the exclusive benefit of those for whose use it was designed. No terms more explicit and unequivocal of such intention can be devised, than those contained in this instrument,

which declares that all property received or acquired under it shall be "holden to the use and behoof of the said President and Fellows, and the scholars of said College."

The President, Professors, and Tutors hold their offices under the appointment of the President and Fellows, and in the first instance are accountable to none else, and can be removed by no one else. They accepted their offices by this tenure, and have corresponding private legal rights. The Corporation is the trustee of the private rights of all the benefactors of the College, and under contracts with them for the faithful administration of their bounty; and trustee, also, of the beneficial interests of the scholars, who have no other representative or protector thereof.

By the eloquent recital in the charter, inviting and inducing patrons of learning and religion to bestow gifts upon this institution for their advancement, and by the provisions subsequently set forth to assure them of its safe keeping and proper administration, there arose an implied contract, on the part of the Government, with every benefactor, that, if he would give his money, it should be deemed a charity protected by the charter, to be administered by the Corporation, according to the general law of the land. As soon, then, as a donation was made to the Corporation, there was an implied contract, springing up and founded on a valuable consideration, that the State would not revoke or alter the charter, or change its administration without the consent of the Corporation. The Government, by thus inducing benefactors to endow the College, have contracted to give perpetuity to their benevolence, in this form, and in this stipulated manner of exercising it. And they have corresponding private rights.

A grant by the State, with or without consideration of any property, right, liberty, or franchise, is as binding and irrevocable as a similar one made by an individual; and the tenure and rights of the grantee are determined by the terms and declared purposes of the grant, without reference to the character of its author.

A state may dispose of its property for charitable purposes, as well as for those of any other nature for which the grantee may desire or take them; but, when it has been thus disposed of, the state ceases to be the owner, and the grantee becomes such in

its place, and with no other accountability than that reserved or created by the grant.

The position taken, that, because the State makes the first donation for the establishment of an eleemosynary corporation—which, by the express terms of its charter, is expected to depend chiefly upon private endowments, and which is vested with absolute power to receive and hold them exclusively to its own use, for the purposes of its creation—it thereby becomes a public Corporation, a mere servant or agent of the public; and that all its funds, however acquired, thus become public property, in which no one but the State has any interest, and that it has no legal rights against the State;—is one which your Memorialists cannot fear will find any favor with the Legislature or people of this Commonwealth. And, on this point, they have only to add, that, if doubt could otherwise exist upon it, they are sustained by the judicial authority of one of the most eminent jurists of this or any other country, in a recent decision, as well as by other authority coeval with the date of the charter.

The remaining ground, upon which the assertion of lawful power in the Legislature to enact this bill rests, is the proviso at the close of the third article in the Fifth Chapter of the Constitution; to a correct understanding of which, a recital of the three articles is necessary. They are as follows:—

"Art. 1. Whereas our wise and pious ancestors, so early as the year 1636, laid the foundation of Harvard College, in which University many persons of great eminence have, by the blessing of God, been initiated in those arts and sciences which qualified them for public employments, both in Church and State; and whereas the encouragement of arts and sciences and all good literature tends to the honor of God, the advantage of the Christian Religion, and the great benefit of this and the other United States of America; it is declared that the President and Fellows of Harvard College in their corporate capacity, and their successors in that capacity, their officers and servants, shall have, hold, use, exercise and enjoy all the powers, authorities, rights, liberties, privileges, immunities, and franchises, which they now have, or are entitled to have, hold, use, exercise and enjoy; and the same are hereby ratified and confirmed

unto them, the said President and Fellows of Harvard College and to their successors, and to their officers and servants respectively forever.

"Art. 2. And whereas there have been at sundry times, by divers persons, gifts, grants, devises of houses, lands, tenements, goods, chattels, legacies, and conveyances, heretofore made either to Harvard College in Cambridge in New England, or to the President and Fellows of Harvard College, or to the said College by some other description, under several Charters successively, it is declared, that all the said gifts, grants, devises, legacies and conveyances are hereby forever confirmed unto the President and Fellows of Harvard College, and to their successors in the capacity aforesaid, according to the true intent and meaning of the donor or donors, grantor or grantors, devisor or devisors.

Art. 3. And whereas, by an act of the General Court of the Colony of Masssachusetts Bay, passed in the year one thousand six hundred and forty-two, the Governor and deputy Governor for the time being, and all the magistrates of that jurisdiction, were, with the President and a number of the clergy in the said act described, constituted the Overseers of Harvard College; and it being necessary in this new Constitution to ascertain who shall be deemed successors to the said Governor, deputy Governor, and magistrates; it is declared, that the Governor, Lieutenant Governor, Council and Senate of this Commonwealth are and shall be deemed their successors; who, with the President of Harvard College for the time being, together with the ministers of the Congregational Churches in the towns of Cambridge, Watertown, Charlestown, Boston, Roxbury, and Dorchester, mentioned in the said Act, shall be and hereby are vested with all the powers and authority belonging or in any way appertaining to the Overseers of Harvard College; *provided*, that nothing herein shall be construed to prevent the Legislature of this Commonwealth from making such alterations in the Government of the said University, as shall be conducive to its advantage and the interest of the republic of letters, in as full a manner as might have been done by the Legislature of the late Province of Massachusetts Bay."

It is to be observed that the first two articles relate exclusively

to the Corporation, consisting of the President and Fellows of the College, and contain a full and emphatic recognition and confirmation, to them and their successors forever, of all their powers, authorities, rights, privileges, immunities, and franchises, and of all the estates vested in them by virtue of conveyances, gifts, or devises, at any time theretofore made; and that the third Article relates exclusively to the Board of Overseers, which it was necessary to reorganize and reconstruct, by reason of the substitution of the State for that of the Provincial Government; unless the proviso at its close is to be construed as extending also to the first and second articles. And further, that, at the time of the adoption of the Constitution, the only charter under which the Corporation was organized and acting was that of 1650.

The first two articles were prepared by the Corporation, and approved by the Overseers, and by their concurrent action presented to the Convention then preparing the Constitution, and were adopted without amendment. The third originated in the Convention.

In order to establish the power of the Legislature to pass the proposed bill, as resting upon that proviso, it is obviously necessary to show that the Provincial Legislature possessed constitutional authority to abolish or alter the Charter of the College at pleasure, as it might from time to time think expedient.

Of the existence of such authority, as founded in the principles of law, the Memorialists think it needless to make any further suggestions. The Committee, however, seem to rely greatly upon the legislation of the Province, as evidence that such authority did exist, and refer to the history of it, as contained in the Report of 1849, for that purpose.

Without further comment upon the principle substantially put forth by both Committees, that legislative action is conclusive proof of constitutional power, than merely to express the dissent of your Memorialists from the doctrine, in which their concurrence might be otherwise inferred, they respectfully submit that the history of the legislation of the Province, in relation to Harvard College, affords no pretence for maintaining that its Legislature ever exercised or claimed any right to rescind, alter, or impair its Charter, or to do anything in derogation of the powers, privileges, or immunities claimed by the Corporation under

it; but, on the contrary, that, so far as any inference is to be drawn from such history, it is decisive against any such claim.

By that history it is found that, after the irregularities that had taken place in consequence of the repeal of the Colonial Charter, and by reason of the temporary misapprehension that the College Charter was also thereby annulled, and in which mistake and irregularities both the Legislature and the Corporation were parties, acting in mutual and friendly concert, the Legislature, upon revision of the subject, and for the purpose of a permanent correction of the error, and of terminating such proceedings forever, passed the solemn declaratory enactment of 1707, above recited; recognizing the Charter of 1650 as being in full force, and as not having been repealed or annulled; and directing the President and Fellows to regulate themselves according to its rules, and to exercise the powers and authority thereby granted. And that, in pursuance of that enactment, the Corporation was reorganized under that charter, by the Executive, with grave formalities, expressive of the sense entertained by the government of its importance, and the rights of the Corporation under it. This order of things continued during the remaining existence of that government, a period of nearly seventy years, without a single act, vote, or resolution, by the Legislature, tending in the slightest degree to alter or impair the charter, or to indicate the least claim on the part of the Government to do so.

And your Memorialists respectfully suggest, that, when it is remembered that in the period which had intervened between the vacation of the Colonial Charter and the date of this enactment, the Provincial Legislature had created several new charters, and which, if lawfully enacted, must for the time being have virtually repealed that of 1650, being of legal operation and effect until disallowed by the Crown; this act was, in effect, a disavowal of their legal authority to create those charters, and an express recognition of the inviolability of that of 1650.

But, in whatever other light this act may be viewed, it certainly removes any pretence that otherwise might be made for construing the preceding legislation, in reference to the College, as founded upon any claim of power to alter or impair the Charter of 1650; and no such claim can exist, derived from any subsequent proceedings of the Provincial Legislature.

Upon this point your Memorialists have only to add, that, upon inspection of this Chapter of the Constitution and application of the ordinary rules of legal construction, they believe that the proviso in question should be confined entirely to the third Article, of which it forms a portion.

That Article created and relates to a supervising body entirely distinct from and independent of the Corporation of the College, the construction and organization of which, being dependent upon the form of government for the time being, had undergone changes corresponding with those which had taken place in the political constitution of the State, and which would necessarily become in like manner subject to alteration, conforming with any which might subsequently occur. Such a proviso, therefore, in reference to a body which had been the subject of previous legislative alteration, might be of very reasonable and natural adoption. And the circumstance that it forms a portion of the whole and single paragraph relating to the Board of Overseers only, without the intervention of a period, and separated from other portions only in the same manner in which all are separated each from the others, is not unworthy of consideration in a question of legal construction of a written instrument. And, as has on another occasion been stated, the annexation of this proviso to the first and second Articles, if it is supposed to contain or imply power to take away, alter, or impair the chartered rights, liberties, immunities, and franchises therein enumerated, would be to render those articles little if anything better than idle words.

Your Memorialists have forborne reference to other legislative proceedings, which would tend, in their judgment, to confirm them in the position which they have thus taken, being satisfied to rest them upon acknowledged principles, and the history of the proceedings of the Colonial, Provincial, and State Governments, above set forth.

In conclusion, your Memorialists trust that, in discharging their duty to the College in this plain statement of their understanding of its rights and interests, they have said nothing that will be thought inconsistent with the respect they entertain for the Honorable House, or that deference to any opinion which it may entertain in regard to the government of an important institution committed to their care, in which they have no interest

other than that in common with all lovers of learning and science throughout the Commonwealth.

All which is respectfully submitted.

JARED SPARKS, *President.*
LEMUEL SHAW,
JAMES WALKER,
CHARLES G. LORING,
B. R. CURTIS,
SAMUEL A. ELIOT.

January 14*th*, 1851.

9 Nov. 1952

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